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# Supreme Court of the United States.

October Term, 1970.

No. 99.

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, INC., ET AL.,
*Petitioners,*
*v.*
REDERIAKTIEBOLAGET TRANSATLANTIC,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

## REPLY BRIEF FOR PETITIONERS.

This reply brief consists of two sections. The first section deals with the argument of Transatlantic that the PBMTA tariff purportedly and improperly supersedes the carriers' conference and tariff and that the Commission did not conclude this issue with finality. The second section deals with what we submit are incorrect recitals of fact in Transatlantic's brief.

### I. The Commission Correctly Ruled that there is No Inconsistency in the Relationships, as Determined by the Commission, between Carrier, Shipper and Terminal. Transatlantic is Bound by that Determination.

The third issue proposed by Transatlantic at page 2 of its brief is: "Can the rights and duties of a steamship

carrier with respect to the cargo it carries, set forth in a tariff which a statute renders legally binding, be superseded by a conflicting tariff of marine terminal operators, published pursuant to no official mandate?" *

Transatlantic endeavors to argue the merits of the question at pages 40-44 of its brief. The argument is that payment by the vessel of the strike storage charges would violate Transatlantic's own tariff and bill of lading. Factually, a reading of these documents will show that no conflict arises. Legally, Transatlantic's position is insupportable, and this is one of the issues which the Commission resolved against the carriers.

Transatlantic's tariff provides that "The rates in this Tariff are port to port rates as customary and unless otherwise specifically stated do not include terminal or any other charges that are for the account of the owner of the cargo" (A. Vol. II, p. 79).

To begin, the carriers' tariff specifies rates charged by the carriers and conditions for cargo between the ports in question (A. vol. II, p. 78). It prescribes terms for users of the service provided *by* the carriers. It does not purport to prescribe terms for those who, like the terminals, are providing service *to* the carriers. Those terms, in the order of things would be native to the tariffs of those providing such service.

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* It might appear at first reading that this issue is not clearly within the grant by this Court of the writ of certiorari, *Irvine* v. *California*, 347 U.S. 128, 129, and hence might be passed over by the Court. See *Local 1976, United Brotherhood of Carpenters &c.* v. *NLRB*, 357 U.S. 93, 96, fn. 1; *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 428-429. But the issue was one within the competence of the Commission. See 46 U.S.C. § 821: "Any person may file with the Federal Maritime Board a sworn complaint," &c. We therefore deal with the question as one that should be dealt with by this Court as under the initial issue posed by certiorari—*i.e.*, whether the Commission's order could be collaterally attacked. Later in this section we show that this issue was decided by the Commission.

The tariff of the vessel, clearly, does not mean the vessel is not bound to pay charges of terminals for the account of the vessel. In fact, the vessel is always obliged to the terminal for dockage charges, which, it may be assumed, are absorbed. The vessel is also liable, where the tariff of the terminal so requires, for wharfage. *Boston Shipping Association Inc.* v. *Port of Boston,* 11 F.M.C. 1 (1967). The vessel further pays the cost of clerks, who do paper work on cargo after discharge at point of rest, cost of cargo watchmen, and cost of insurance while goods are on the pier (A. Vol. II, pp. 52-53).*

The terminal, subject to review by the Commission and the courts, decides which interest will pay the several charges, based on who has the benefit of the service.

The discussion by Transatlantic at pages 40-44 seems to assume that payment by the vessel of strike storage charges would obligate the vessel to charge its customer. This is a complete misapprehension. The storage of cargo during a longshoremen's and clerks' strike is for the benefit of the vessel which has not yet completed its service. The service includes free time. Conceivably under the terms of its bill of lading, the whole of which is not in the court record, but which was in the record before the Commission (A. Vol. I, p. 38, par. 15(b)), the vessel *could* pass the charge on to its customer. See *International Packers, Ltd.* v. *Federal Maritime Commission,* 356 F. 2d 808 (D.C. Cir. 1966). But that question is not before the Court. The question is rather the right of the terminal to charge the vessel. Payment of such charge is not in any way an enlargement of the vessel's tariff.

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* The vessel in New York is also assessable for the cost of moving import cargo from place of rest to truck tailgate. *Truck Loading and Unloading Rates at New York Harbor,* F.M.C. Docket 65-46 (Mimeograph, Sept. 18, 1969).

The flaw in Transatlantic's argument is that it mistakenly assumes that an affirmance of this shift in charge will require a change in its own rates in violation of its tariff. While the respondent may desire to increase its rate, nothing in this case remotely requires it to do so. Procedures exist by which the vessel interest may seek approval of a change in rate deemed economically desirable. There is nothing in itself illogical in charging the vessel for wharf demurrage.

> "*Free Time and Demurrage Charges on Export Cargo*, F.M.C. Docket No. 68-9 (Mimeograph, April 9, 1970), at p. 37. "As the Examiners found, the assessment of demurrage against the vessel in cases of vessel cancellation or delay also accords with the practice in many ports." Compare 46 C.F.R. part 541, 35 Fed. Reg. 6276, postponed at p. 10,858.

Transatlantic also relies on language in its bill of lading to support its argument that an affirmance of the District Court decision would require a violation of its own tariff. The respondent cites (Brief, p. 42) the following provision:

> ". . . the carrier has no responsibility whatsoever for the goods prior to the loading on and subsequent to the discharge from the vessel."

Transatlantic uses this language, in conjunction with its tariff, to support its conclusion that "the rates and charges which the cargo interest was obligated to pay for Respondent's services did not include any terminal services. Rather, terminal charges were specifically stated to be for the account of the cargo" (Respondent's brief, p. 42).

As shown above, Transatlantic's tariff does not prevent the assessment against vessels of charges of terminals where the vessel is the user or beneficiary of the service (A. Vol. II, p. 17). Presumably the respondent considers such charges of terminals in its rate-setting. As a matter of fact, then, the tariff and bill of lading language does not prevent the payment by vessels of any charge of terminals.

From this misreading of its own tariff and bill of lading, Transatlantic goes on to offer an erroneous legal interpretation of its obligations under its tariff and bill of lading. In essence, the respondent holds that its liability for charges ends when the cargo is freed from ship's tackle and set upon a pier.

This very argument was made to the Commission which had Transatlantic's own bill of lading in evidence before it (A. Vol. I, p. 38). The Commission's reaction to the argument deserves extensive quotation:

> "Complainants' simplistic characterization of a common carrier's duty as the 'duty to carry' does not go far enough, and the carrier's obligation does not end with the deposit of the goods upon a 'reasonable pier.' The carrier must also 'tender for delivery' which obligation requires that the carrier unload the cargo onto a dock, segregate it by bill of lading and count, put it at a place of rest on the pier so that it is accessible to the consignee and afford the consignee a reasonable opportunity to come and get it. *American President Lines, Ltd.* v. *Federal Maritime Board,* 317 F. 2d 887, 888 (D.C. Cir. 1962). Once this has been done, and absent a special contract, the carrier's transportation obligation is discharged.
>
> "In discharging its obligation to tender for delivery, the carrier must provide a convenient and safe place to receive the cargo from the shipper and for the con-

signee to accept delivery. *Terminal Rate Increases—Puget Sound Ports*, 3 U.S.M.C. 21 (1948). Thus, the carrier must provide adequate terminal facilities. *Intercoastal Rates to and from Berkely*, 1 U.S.S.B.B. 365 (1935), *Intercoastal Investigation 1935*, 1 U.S.S.B.B. 400 (1935). A carrier may not divest itself of this obligation, *Terminal Rate Increases—Puget Sound Ports, supra*, though it may contract for the facilities of another person such as a terminal operator in which case the terminal operator is in effect the agent of the carrier. *Free Time Practice—Port of San Diego*, 9 F.M.C. 525 (1966).

"At Boston, 'free time', or the period reasonably required to allow a consignee to pick up his cargo, appears in the respondent terminals' tariff and no comparable provision appears in the carrier's tariff. The piers and wharfs are actually provided by respondents [petitioners here]. The obligation to provide free time and effective facilities to make that free time meaningful and realistic remains the carrier's, At Boston, the free time period is 5 days. Once the cargo has remained on the pier for these 5 days, the transportation obligation of the carrier is ended and the services performed by the terminal for the carrier are also at an end. Any other services performed by the terminal in receiving, handling, storing, or delivering the property are normally performed for the consignee or the shipper." (A. Vol. II, pp. 58-59.)

. . . . . .

"That the [strike storage] services in question were supplied to the cargo is in one sense a valid statement. In transportation all the services, be it the actual carriage or the variety of attendant services, are performed for or supplied to the cargo, the ultimate object

being to move the cargo from the point of origin to its ultimate destination. But the cargo cannot be divorced from the persons owing obligations to it. In the past when considering the proper allocation of terminal charges, it has been customary to divide terminal services into two general categories: those performed for the 'vessel' and those performed for the 'cargo'. While we have no desire to change this customary usage, it must always be borne in mind that the cargo is not some separate entity which is itself capable of paying for services rendered. The charges must always be paid by some person standing in a prescribed relationship to the cargo. Thus, where the terminal is the intermediate link between the carrier and the shipper or consignee, one of these two persons must pay the terminal's cost of providing the services rendered. The question here is which of these two should pay the charge in issue. We would place the burden upon him who at the time of the strike owes an undischarged obligation to the cargo. *Thus, where the cargo is in free time and a strike occurs, it is the vessel which has yet to discharge its full obligation to tender for delivery and it is to the vessel that the terminal is at this point in time supplying the attendant facilities and services. It is therefore just and reasonable to require the vessel to pay the cost of the supervening strike which renders the discharge of that responsibility impossible.*" (A. Vol. II, pp. 60-61.) (Emphasis added.)

Thus, apart from a grammatical analysis of the tariff language which shows no conflict, the Commission decision establishes the same point as a matter of law. Indeed, so far from the shift in incidence of strike storage charges creating a conflict with the respondent's tariff, it is entirely

fair and reasonable that the charge fall on the vessel, not because an arbitrary turn of the wheel says so, but because Transatlantic's tariff and bill of lading contemplate it as part of the duty to deliver.

Transatlantic's argument on this point is, as the Commission said, "simplistic." Furthermore, in view of the Commission's discussion of the issue, as quoted above, it is astonishing to find Transatlantic informing the Court that this issue was "not tendered to the Commission or not within its competence" (Respondent's brief, p. 4). The issue was both tendered to the Commission and decidedly within its competence.

We do not overlook a slighting prefatory statement in Transatlantic's argument at page 40 that "The district court ignored the issue, in common with all others which Respondent tendered." The issue was presented to the District Court in Transatlantic's memorandum (A. Vol. 1, p. 7), and the District Court considered Transatlantic's various contentions and found them to have "no merit" (A. Vol. I., p. 42). Whether the judge was right or wrong, the suggestion that he ignored every point raised by a party offers gratuitous offense. We submit that the judge was entirely right, and that consideration of the reasoning in Transatlantic's brief shows that he properly dealt with the point on a summary basis.

## II. Transatlantic's Brief Misstates Several Facts or Points.

The final function of this reply brief is to correct various misstatements of fact which appear in Transatlantic's brief. Some have been touched on in the earlier discussion and will be briefly mentioned here.

1. On page 4 of its brief, Transatlantic states that only "some of the issues" in the case went to the Commission,

citing the contract question and the tariff question (discussed in Part I). As a matter of fact, no contract question was pleaded, nor was any evidence bearing on such a question offered. The tariff question, on the other hand, was both tendered to the Commission and within its competence. So much of the respondent's argument which rests on these misstatements of fact must therefore be discounted.

2. On page 5 of its brief, Transatlantic implies, in two places, that the terminals' tariff existed as a private agreement prior to the approval of Agreement No. 8785. In fact, the Agreement, as approved, took effect February 26, 1962 (A. Vol. II, p. 5). The tariff, however, was not issued pursuant to the Agreement until June 15, 1962, as Transatlantic itself stipulated at trial (A. Vol. I, p. 36.)

The purpose of Transatlantic's attempt here to imply that the tariff pre-dated the Agreement is to use the tariff to define certain terms used in the Agreement. This purpose is shown, on page 5 of the respondent's brief, where Transatlantic identifies "wharf demurrage" as used in the Agreement and defined in the subsequent tariff, with "strike storage" as used in the tariff, and then imports into the Agreement from the tariff an absolute definition of both charges as the responsibility of cargo. From this confusion thrice-confounded, the respondent emerges to announce (Brief, pp. 5-6) that "the petitioners' statement . . . that the terms of Agreement 8785 'do not themselves specify the incidence of any charges' is . . . incorrect . . . " The Agreement itself (A. Vol. II, pp. 5-10) is the best evidence of what it provides. A reading will show that it does "not specify the incidence of any charges." The specification of charges was not made until five months later. Transatlantic's attempt to make the tariff terms control the Agreement apparently arises from failure to read the documents with care.

3. More misstatements of fact appear on page 7 of Transatlantic's brief where it is said that the Government "in the Commission's tradition" refuses to quote and, indeed, "ignores" Article Third of Agreement 8785. In fact, the Commission referred to Article Third in its decision (A. portions on pages 3 and 4 of its brief.

4. Also, on page 7 of its brief, Transatlantic refers to the PBMTA tariff as "unofficial and non-binding." The stipulation of facts signed by Transatlantic's counsel (A. Vol. I, p. 36) specifically asserts that the "tariff was filed with the Federal Maritime Commission in accordance with the requirements of Agreement No. 8785." If such a tariff is "unofficial," then a distinction between "official" and "unofficial" tariffs is meaningless. So also with the assertion that the tariff is "non-binding." If the tariff is non-binding, then what is its reason for being? It surely binds the terminals and those who use their facilities. It binds the respondent to pay dockage fees. And, with respect to free time, the terminals have the right to establish free time periods as clearly indicated by the quotation from *Free Time and Demurrage Charges on Export Cargo* (Doc. 68-69), cited in note 5 on pages 7-8 of Transatlantic's brief.

5. At page 33 of its brief, Transatlantic argues that the requirement of approval under § 15 is in the public interest because the "public is permitted to protest or seek a hearing." This contention assumes that without such a requirement there would be no opportunity to make such a protest.

On the contrary, Agreement No. 8785 specifically provides for notice to the public before changes become effective (A. Vol. II, p. 8). No change can become effective on less than 30 days' notice unless good cause exists for shorter notice. In the latter case, which did not arise in the case at bar, reasons for shorter notice must be forwarded to the Commission. *Ibid.*

In the case before the Court, there was plenty of opportunity for Shipping and Transatlantic to complain to the Commission. As early as September 29, 1964, months before the ILA strike, Shipping notified PBMTA of objections to the tariff change (A. Vol. I, p. 17). As the Commission found, in the months following September, 1964, two or three meetings took place, which ended with the parties still at odds (A. Vol. II, p. 54). PBMTA told Shipping that it would assess the charge against the vessel but that if there was any complaint to file it with the Commission. *Ibid.* In fact, PBMTA had to make a motion in the District Court more than a year later, to demonstrate this opportunity.*

On the adequacy of Commission procedures, see elaborate discussion in *Agreement, No. 9025: Middle Atlantic Ports Dockage Agreement,* 8 F.M.C. 381 (1965), quoted at length in our original brief at p. 39.

6. At three points in its brief, Transatlantic cites and relies on *Terminal Rate Structure-Pacific Northwest Ports,* 5 F.M.B. 53, 59 (1956). See pp. 5, 29, 35 and 43. We referred to this case at page 39 of the PBMTA brief. Transatlantic's citation omits the subsequent decision on rehearing in 5 F.M.B. 326 (1957), in which the Federal Maritime Board specifically ruled that "in every case the terminal operator may bill and collect from the vessel, and in instances where the charges are incurred for the benefit of the cargo the carrier shall bill and collect such charges from the shipper or consignee."

* Ironically, even after Shipping had filed its complaint with the Commission, Shipping, according to the Commission's report (A. Vol. II, p. 55, fn. 7), "contended that we were without jurisdiction."

## Conclusion.

For the reasons stated herein and in our main brief, the petitioners submit that the judgement of the Court of Appeals for the First Circuit, should be reversed, and the case be remanded with directions to affirm the judgment of the District Court.

Respectfully submitted,

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